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IN THE

Supreme Court of the United States

RECEIVERS OF
VIRGINIA IRON, COAL & COKE CO., ET ALS.

PETITIONERS

V.

WILLIAM H. STAAKE, TRUSTEE OF C. R. BAIRD & COMPANY, BANKRUPTS

RESPONDENTS

October Term, 1905, No. 214

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth District

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REPLY BRIEF FOR PETITIONERS

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States

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HOLMES CONRAD
WILLIAM GORDON ROBERTSON
EDWARD W. ROBERTSON
For Petitioners

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905, No. 214.

Receivers of Virginia Iron, Coal & Coke Co., et. als.

PETITIONERS,

v.

William H. Staake, Trustee of C. R. Baird & Company, Bankrupts.

RESPONDENTS.

QUESTION INVOLVED.

It is stated in the brief of counsel for Respondent that the question involved is,

> "Whether a creditor who levies an attachment on property of an insolvent debtor within four months of the petition on which the debtor, is adjudged a bankrupt, can retain the fruits of the attachment for himself alone, or must permit the general creditors of the bankrupt to share therein."

A brief consideration of the record will show that this is not the question involved at all. The real question is, whether an attachment, which becomes a lien on the property of *a third* party (and not upon that of the bankrupt) by virtue of the Registration Laws of the State of Virginia, is void, simply be-

cause the claim upon which the attachment is based is against the bankrupt.

ARGUMENT.

In the brief filed for respondent, the right of the trustee of the bankrupt to avoid the attachments levied upon the property of the Roanoke Furnace Company, is sought to be maintained on two grounds, and we will consider those two grounds in the order stated in said brief.

(1) It is claimed that the attachments can be avoided under section 67e of the Bankrupt Act. In the argument made to sustain this proposition, it is assumed by learned counsel for respondent that the Furnace property, which had been sold on December 7th, 1899, by Baird to the Roanoke Furnace Company by a written contract, and the legal title of which was conveyed on November 5th, 1900, for a valuable consideration, and with no fraud in the contract or deed, still remained the property of Baird. Counsel for respondent leave out of view entirely the contract of December 7th, 1899, and discuss the case as if the deed of November 5th, 1900, was the first and only transaction between Baird and the Furnace Company. The agreed statement of facts, which will be found on page 14, Record 214, sets out fully the nature of this contract. (See section 4 of said statement, Record 214, page 15). As soon as this contract was made under the laws of the State of Virginia, as under the Common Law universally prevailing, the Roanoke Furnace Company became the beneficial owner of the land, including the Furnace thereon, which was agreed to be conveyed to it.

See II Minor's Institutes (3d Ed), p 217, where it is said, "If a contract is made for the sale of lands, the seller is immediately regarded as trustee of the land for the purchaser and the purchaser as a trustee of the money for the seller."

Baird retained no lien on or interest in the property itself, but became owner, by virtue of this contract, of $500,000.00 worth of the stock of the Roanoke Furnace Company.

In order to prevent possible confusion, the attention of the Court is called to the fact that the case of the First National Bank of Baltimore vs. William H. Staake, Trustee, No. 213 on the docket of this Court, was heard and determined together with the present case, No. 214 and that, while a separate agreement as to the facts was made between the First National Bank of Baltimore and the Trustee of the Bankrupt, (See Record in 213, page 8), in addition to the agreement as to the facts made with the Receivers of the Virginia Iron, Coal & Coke Company and others, (See Record 214, page 14), both agreements as to the facts were relied on and incorporated in the answer of our clients, as well as in the answer of the First National Bank of Baltimore. (See Record No. 214, page 17.)

By reference to Record No. 213, page 10, it will be seen that the consideration for the deed of November 5th, 1900, is set forth in full, and is as follows:—

> "That in consideration of the issuing and delivering of certain shares of the capital stock to the amount of $500,000.00 of the said Roanoke Furnace Company, in pursuance of a certain agreement between the parties hereto the *receipt heretofore of the certificates for which shares is hereby formally acknowledged*. It is expressly understood and agreed, however, that this conveyance has been made subject to the payment by the Roanoke Furnace Company of the balance of the purchase money due or to become due to Robert E. Tod on the land of which the hereby granted premises are a part, the payment of which balance of purchase money has been assumed by the said Roanoke Furnace Company." And the further statement is made, "That, as of November 5th, 1900, the amount due

Robert E. Tod was something over $40,000.00, which amount was subsequently paid out of the proceeds from a sale of the property of the Roanoke Furnace Company."

From this statement, it appears that *prior* to the deed of November 5th, 1900, Baird had received the entire consideration for the deed, namely the $500,000.00 of stock of the Furnace Company, and that the amount then due to Tod was only Forty Thousand Dollars, and that this had been paid out of the proceeds of the sale of the property of the Furnace Company. Yet on the face of this statement, it is claimed, in the brief of our opponents, (See Respondents Brief, top of page 6) that "the consideration received by the insolvent Baird, for the property attached whatever its amount, must have been diminished by the exact amount of claims sought to be recovered by the attaching creditors." If this were a fact, it is impossible to believe that it would not have been inserted in the agreed statement of facts. And yet we find there absolutely nothing in regard to this matter.

In addition to this, counsel for respondent, at the bottom of page 6 of their brief, again go outside of the record and make a statement of fact, for which there is absolutely no proof and upon which the agreed statement of facts is silent, as to the amount paid by Baird for the Furnace Company to Tod, the original owner of the property, as an alleged part of the amount which had been assumed by the Roanoke Furnace Company. It is true that a claim of this kind is set up in the petition (See Record No. 214, page 10, section 2, of the petition), but it is denied in the answer of our clients which admits as true only the facts agreed on and no proof was taken to substantiate this claim. We assume, therefore, that this court will not pay the slightest attention to any statements of this kind, but will

confine itself strictly to the record before it and the agreed statements of fact therein contained.

It is claimed in respondent's brief that the briefs submitted by petitioners contain assertions not warranted by these agreements. It is said, "In the brief of the Receivers of the Virginia Iron, Coal & Coke Company, it is asserted that the attachments were against the property of Roanoke, whereas, in the agreement, it was stated that the attachments were against the estate of Baird. (See Record No. 214, page 18, section 8.)" We invite the attention of the Court to the exact language used in section 9 of said agreement to show that counsel for the respondent have not, themselves, stated accurately what is contained in said agreement. Section 8 says nothing about the property being that of Baird, but Section 9 reads as follows:

(Record 214, page 16.)

> "That inasmuch as the contract and deed from C. R. Baird and Company to the Roanoke Furnace Company had not been recorded at the time of the levying of such attachments, the property therein conveyed is to be deemed and taken under the laws of the State of Virginia, as the property of the said C. R. Baird *quoad* the said attachment creditors of the said C. R. Baird and Company in the said schedule mentioned, and *quoad* the liens and debts therein referred to and *no further*, and that said attachments were valid liens on the property levied on as of the dates of said levies respectively, subject to corrections, if any, as to the amounts of said debts."

This language, it is respectfully submitted, can not be construed into an admission on the part of petitioners that the property actually belonged to Baird at the time of the levying of the attachments. Section 4 of the same agreement, already adverted to (See record 214, page 15), had already set forth the *facts* about the contract and about the deed. Section 4 must be read along with Section 9 in order to clearly under-

stand the latter. It will be seen, when this is done, that Section 9 simply contains a form of statement as to a conclusion of *law*, not a statement of *fact*, and that, it does not, even as a matter of law, state that the property was absolutely that of Baird, but it says that it

> "Is *to be deemed and taken* under the laws of the State of Virginia as the property of C. R. Baird, *quoad* the said attachment creditors of the said C. R. Baird and Company in the said schedule mentioned, and *quoad* the liens and debts therein referred to and *no further*."

It is obvious, when this language is read, with the first clause of Section 9, that all that it meant was, that the failure to record the contract, as well as the deed, rendered both the contract and the deed invalid as to the attaching creditors, but "*no further.*"

This is a very different proposition from the bold and unqualified assertion that the property was Baird's made in respondents brief.

By reference to Section 2464 of the Code of Virginia which is inserted on page 4 of our opening brief, it will be seen that it is provided, that

"Any such contract, if in writing [i. e. a contract in writing for the sale of land] shall, from the time it is duly admitted to record be as against creditors and purchasers as valid, *as if the contract was a deed conveying the estate* or interest embraced in the contract."

Section 2465, which immediately follows the foregoing section, provides that, such contract shall be void as to purchasers for valuable consideration without notice, and creditors, until and except from the time that it is duly admitted to record, etc.

If, therefore, the contract of December 7th, 1899, had been properly recorded, then it would have been as good as a deed

and the attaching creditors would have obtained no lien on the property. The failure to record the contract does not affect it as between the parties, but only as to purchasers and creditors.

See Young v. Devries 31st Grattan page 308 in which the Court of Appeals of Virginia in speaking of a case where parties had purchased land under a written contract which they had failed to have recorded, and against which the lien of a judgment against the vendor was enforced, uses the following language:—

"If any injustice is done to them in subjecting the lands in their hands to the judgments rendered against their vendor, it is due to their negligence. The law pointed out to them a plain duty; that of putting on record the evidence of their title. Having failed to do so the loss must fall upon them."

Thus it is seen that it is the duty of the vendee and not that of the vendor to record his contract in such a case. In fact, he is the only party who has control over the contract and has the right to record it.

There is no provision in the Bankrupt Act, nor in the laws of the State of Virginia, upon which to base the claim to the effect that if the petition in bankruptcy against Baird had been filed on the date immediately succeeding the levying of the attachments, that the Trustee in bankruptcy would have stood in the same situation as an attaching creditor as against the Roanoke Furnace Company. If there had been no attachments at all, a petition in bankruptcy filed at any time after the 7th day of December, 1899, when Baird made the written contract with the Furnace Company for the sale of the Furnace property, would have had no effect whatever as to the property embraced in said contract. It is not pretended that there was any fraud against the creditors of Baird or against the provisions of the Bankrupt Act, but it was admitted that this was a valid contract. The registration laws of the State of Virginia do not protect the Trustee in bankruteyp

any more than the bankrupt himself, as to a valid sale of real estate. Such trustee stands in the shoes of the bankrupt and can make no higher claim to the property embraced in said contract than the bankrupt could himself.

In addition to the authorities we have quoted in our opening brief on this point, we call the attention of the Court to Collier on Bankruptcy (5th Edition) page 554, where it is said

"It is well settled that the trustee takes not as an innocent purchaser, but subject to all valid claims, liens and equities. Thus, he has no better title than the bankrupt had."

See also

Chattanooga National Bank v. Rome Iron Company 4 A. M. B. R. 441, 102 Fed. 755.

See especially page 446 in which the Court quotes with approval the following language of Judge Story in the case of Winsor v. McClellan 2d Story 492.

"Now the principle has been long established that the assignee in bankruptcy does not stand in the position of a purchaser, nor even in so favorable a position as an individual creditor may stand * * * * * * * *

"The assignee in bankruptcy takes the property of the bankrupt in cases unaffected by fraud in the same plight and condition that the bankrupt himself held it and subject to all the equities which exist against the same, in the hands of the bankrupt. This was clearly laid down by Lord Hardewicke in Brown v. Heathcote 1st Atk. 160 and 162 and has ever since been adhered to, not only in Courts of equity, but also, as the case of Leslie v. Guthree, 1 Bing, N. C. page 697 abundantly shows, at law, etc."

In re N. Y. Ecom. Ptg. Co. 6 A. M. B. R. 615—110 Fed. 514.

Therefore, we still claim as a matter of fact, and one which clearly appears from the record, taht this property was the

property of the Roanoke Furnace Company when the attachments became liens upon it, and that they only became liens because the Furnace Company failed to have recorded the evidence of its title.

But it is idle to speculate on what would have been the result if proceedings in bankruptcy had been taken at a time when they were not taken.

On the 24th day of December, 1900, when the petition in bankruptcy was actually filed in this case, forty-seven days had elapsed since the deed conveying the Furnace Property to the Furnace Company had been recorded. It is admitted in the agreed statement of facts (see record No. 213, page 10, section 9) that this deed "Was a valid conveyance to a purchaser in good faith for a then fair consideration *and was not affected by the bankruptcy proceedings hereinbefore mentioned.*" And, yet it is gravely claimed that this property was still the property of Baird which would pass to the Trustee of Baird, to be distributed amongst all of his creditors.

We have already undertaken to show that the preference mentioned in section 67c must refer to a preference of one creditor over another in the distribution of the *bankrupt's estate.* The only property which the Bankrupt Law seeks to deal with, is the property of the bankrupt. There is not a single clause or provision in it, which, by the greatest ingenuity, can be twisted into such a construction that it would cover the property of a *bona fide* purchaser for value from the bankrupt. And counsel for the respondent can get no comfort from the fact that, on page 8 of our former brief, we admitted that the bankrupt law was intended to deal with the bankrupt's *creditors.* This is not denied, but, it will be seen that we were careful to state that *the property* that is dealt with, is the estate *of the bankrupt*, and that that with the estate of others than the bankrupt, it was not intended to have anything to do. And we confess that we can see nothing in the brief of counsel for

the respondent which militates against this proposition, but, on the contrary, the whole brief is practically an admission of the truth of our contention as it is based on the assumption that the property in this case, was not the property of the Roanoke Furnace Company, but the property of Baird, the bankrupt, which assumption, as has been shown, is utterly groundless.

It is hardly necessary, but we think it better to state that, counsel for respondent are mistaken in saying that it is conceded by us that the filing of a petition in bankruptcy is in all respects exactly like an attachment. We submit that if counsel had read the entire paragraph, beginning at the bottom of page 7 of our opening brief, it would have been apparent that what we said was intended to show that there was a very decided difference between an attaching creditor under the State laws and a Trustee in Bankruptcy, so far as their right to subject the property of third parties is concerned and one of the main differences, is that a contract for the sale of land if unrecorded is void as against an attaching creditor because made so by our Virginia statute, but is not void as to the Trustee in Bankruptcy who stands only in the position of the Bankrupt as we have already seen.

(2) It is further claimed that the attachments can be avoided under section 67f, the section upon which the District Court and the Circuit Court of Appeals based their decision. We do not consider it necessary to answer, in detail, and at any great length, what is said in regard to this section, because, the opening briefs filed in this case, fully discuss this point. The whole argument of our opponents on this point, practically, amounts to this, that section 67f speaks of liens against a *person* who is insolvent, that therefore it is intended to cover the property of third persons, as well as that of the insolvent, provided the insolvent is a debtor and a party to the proceeding. We submit that, this

is sticking in the bark and that it is not a proper construction of the language of 67f. In the strict sense of the word, there is no such thing as a *lien against a person.* A person is not subject to a lien. It is the *property* of a person that in the eyes of the law, is subject to the lien. And in this connection the attention of the court is called to the fact that, section 67f does not say "liens against a person" but it says "Liens obtained through *legal proceedings against* a person," and it is obvious that the words "against a person" refer to the words immediately preceeding "*legal proceedings*" and not to the word "*liens.*" In this case, it is true that Baird was a party defendent to the legal proceedings in which the attachment was obtained, and in that sense it was against him, but the *lien* of the *attachment* obtained by the proceedings was upon the property which had been sold to the Roanoke Furnace Company, and, which therefore, belonged to that Company and not to Baird.

It is claimed that the facts of this case constitute the only conceivable state of facts to which the language in Section 67f in regard to keeping alive the attachment and subrogating the trustee to the right of the attaching creditor can apply. This is an entirely unwarranted assumption on the part of our opponents. In the great number of States of the Union, there are all kinds of statutes with reference to attachments and other liens and the method of their enforcement. In Virginia, we have a statute which allows you to bring a suit in Equity for the purpose of obtaining an attachment against a non-resident, as was done in this case, and this suit can be brought either on a debt due or to become due and the proceeding is a good one to enforce the lien of the attachment by the sale of property attached, especially in the care of real estate (as in this case.) It is obvious, that it is a benefit to the trustee of the bankrupt representing all the creditors, to be given the power to take advantage of the proceeding in the

State Court, whereby he is furnished a simple method of enforcing his lien. He is thereby given his choice of courts and gets the advantage of the statutes in regard to the enforcing of liens. There may be other reasons assigned equally as good, why this provision is contained in Section 67f and a similar provision in 67c, but the one given, we believe, is sufficient. If not, it is not for us to give reasons for the law. Whatever the reasons, it seems plain to us that this provision can not be construed into giving the Bankrupt Court jurisdiction over the property of others than the bankrupt in the absence of plain language to that effect.

We believe that a careful reading of Section 70a will show that the only property intended to be affected (with the exception of property conveyed away in fraud of creditors) is, that to which the bankrupt has *title*. The words, "by operation of Law," can not be restricted as is sought to be done, to property which would pass without special order of the Court, because these words are used generally and made to cover expressly "property transferred in fraud of his creditors" which can only be recovered by a proceeding in Court.

The discussion on page 14 of our opponent's brief as to the meaning of the word "*prior*" in Section 70a, with all due respect, does not seem to us to require much comment.

It clearly can not mean that a valid *bona fide* conveyance to a purchaser for valuable consideration, can be annulled in favor of the trustee in bankruptcy, because, forsooth, the deed is made within the four months period prior to the bankrupt proceedings; and yet this is the logical result of our opponent's reasoning.

It is not considered necessary, nor would it, we think, be profitable to pursue this subject further, but we rely on what has been said in our former brief to show that Section 67f is not broad enough to reach the case now under consideration.

We respectfully submit that the judgment of the Circuit Court of Appeals should be annulled; that your petitioners should be given the full benefit of the liens of their attachments.

Respectfully Submitted.

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EDWARD W. ROBERTSON,
of Counsel for Petitioners.